PUBLIC PROSECUTOR

v.

WONG YEE SEN & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA THAMBY CHIK JC
[FT CRIMINAL TRIAL CR. NO. 58-2-86]
2 NOVEMBER 1989

CRIMINAL PROCEDURE: *Dangerous Drugs Act 1952 - Charge under s. 39B(1)(a) - Close of prosecution's case - Cautioned statement of accused - Not introduced during prosecution stage - Whether prosecution permitted to use cautioned statement of accused during case for the defence - Whether cautioned statement can be used to impeach credit of accused during cross-examination by prosecution - Section 37A Dangerous Drugs Act 1952.*

In this case, all 5 accused persons were facing a charge of drug trafficking under s. 39B(1)(a) Dangerous Drugs Act 1952. The Court ruled that a *prima facie* case had been made out at the end of the prosecution's case and all 5 accused persons were called upon to enter their defence. During cross-examination by the learned Deputy Public Prosecutor the 1st accused was questioned about the contents of his cautioned statement, to which defence Counsel objected. The Court was then called upon to make a ruling as to whether the prosecution is permitted to use the cautioned statement of the 1st accused to impeach his credit; the cautioned statement not being part of the prosecution's substantive evidence.

Held:

[1] In the interest of justice and fairness, a cautioned statement of an accused person, provided that it is voluntary, not introduced during the prosecution stage, can be permitted to be used by the prosecution to impeach the credit of the accused person during the case for the defence.

[2] The cautioned statement should be shown to the trial Judge, in order for him to determine the said contradictory portion in the accused's cautioned statement.

[3] If the Judge finds material contradiction in the cautioned statement, a trial-within-a-trial should be held to determine its admissibility.

[4] The contradictory portion of the cautioned statement must be proved and brought to record.

[5] The contradictory portion of the cautioned statement cannot be admissible as evidence of facts stated therein except for the sole purpose of impeaching the accused's credit.

[Order accordingly.]

Cases referred to:

PP v. Teng Chen Choi [1989] 2 CLJ (Rep) 377
Dato' Mokhtar bin Hashim v. PP [1983] CLJ (Rep) 101
Tua Kin Ling v. PP [1970] 2 MLJ 61
Husdi v. PP [1980] 2 MLJ 80
Krishnan & Anor. v. PP [1981] 2 MLJ 121
Yusoff bin Sidin v. PP [1971] 1 MLJ 203
Briji Bhushan Singh v. R. [1946] AIR PC 38

Mamand v. Emperor [1946] AIR PC 45
Pavone v. PP [1986] 1 MLJ 72
Jones v. Rex [1948] 14 MLJ 182
Muthusamy v. PP [1948] 14 MLJ 57
Muluk b. Ahmad & Anor. v. PP [1989] 1 CLJ (Rep) 113

Legislation referred to:
Criminal Procedure Code, s. 113, (1)
Dangerous Drugs Act 1952, ss. 37A, (1), 39B(1)(a)
Evidence Act 1950, ss. 143, 145, 146(a), 146(c), 155(c), 157
Criminal Procedure Code [Ind], s. 164

For the public prosecutor - Jalaludin bin Saleh, DPP
For the 1st accused - Gulam Mustaffa bin Nadar Ali Khan; M/s. Gulam Mustaffa & Co.
For the 2nd accused - Leong Wey Pyu; M/s. W.P. Leong
For the 3rd accused - Kartar Singh with him (Mr. Gurbachan Singh Pannu; M/s. Bachan & Kartar)
For the 4th accused - Teh Boon Eng with him (Collin Goonting; M/s. Collin Goonting & Co.)
For the 5th accused - Sidney Augustin Cyril; M/s. Augustin Negrin & Co.

JUDGMENT

Faiza Thamby Chik JC:

The issue here is simply this. Can the prosecution be permitted after closing their case but during the case for the defence to use the cautioned statement of an accused person which has not been introduced at the prosecution stage to impeach his credit during the course of his cross-examination by the prosecution?

In this trial, the 1st accused Wong Yee Sen with four others is facing a charge of dangerous drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952.

At the end of the case for the prosecution, I ruled that a *prima facie* case has been made out and I called upon the accused together with the other four accused persons to enter upon their defence.

Then at this stage of the proceeding, the defence applied for this ruling on the cautioned statement of the 1st accused as well as those three others which have not been part of the evidence for the prosecution who have already close their case.

I then proceeded to hear the submissions on the defence's application for a Court ruling as to whether the prosecution is permitted to use the cautioned statement of the 1st accused to impeach his credit; the cautioned statement not being part of the prosecution's substantive evidence.

In his submission, Mr. Gurbachan Singh Pannu submitting on behalf of the other four defence Counsel applied for a Court's ruling as to whether the prosecution is permitted to use the cautioned statement of the 1st accused to impeach his credit as stated in s. 37A of the Dangerous Drugs Act 1952, after not having used the cautioned statement as part of the case for the prosecution in evidence. The learned Counsel submitted that the prosecution could not be allowed to do so unless the cautioned statement was used as substantive evidence earlier in the case for the prosecution. He quoted me two main cases in support of his contention:

(1) PP v. Teng Chen Choi [1989] 2 CLJ (Rep) 377;

(2) PP v. Peh Ning Ning FTCT No. 46/86 (unreported)

Both are the decisions of the Honourable Mr. Justice Mahadev Shankar. He also submitted that s. 37A of the Dangerous Drugs Act 1952 should be read conjuctively.

Mr. W.P. Leong, Counsel for the 2nd accused submitted that the prosecution having offered the four recording officers who recorded the cautioned statements of the other four accused persons to the defence, it is up to the defence to use the cautioned statements or not.

In his submission, the learned DPP, Encik Jalaludin Saleh, submitted that the two main authorities submitted by the defence are those of High Court rulings and therefore he said are not binding in this Court. He again submitted that s. 37A of the Dangerous Drugs Act 1952 should be read disjunctively and stressed that s. 37A(1) *inter alia* states:

> ... if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

The submissions were made on 26 June 1989, the 23rd day of the trial.

When the Court met again on 29 June 1989, the 24th day of the trial, I ruled that that was not the appropriate stage as it was not necessary for me to make such a ruling as the occasion has not arisen yet at this stage for such a ruling.

Then on 27th day of the trial, that is on 1 November 1989, the prosecution in the course of cross-examining the 1st accused asked, "Did you make a cautioned statement to the police?" 1st accused answered, "Yes, I did." "What did you tell the police in the cautioned statement?" At this stage, defence Counsel Encik Gulam Mustaffa, Counsel for the 1st accused objected to the question because he said that the cautioned statement has not been admitted in evidence and a ruling by me is yet to be made on this matter. In the circumstances, the learned DPP withdrew the question in expectation of this ruling.

In *PP v. Teng Chen Choi* [1989] 2 CLJ (Rep) 377, Mr. Justice Mahadev Shankar said:

> It was not open to the prosecution to utilise the cautioned statement to impeach the accused's credit because to allow the prosecution to initiate a trial within a trial to determine the admissibility of the statement not-withstanding that they have closed their case would be to allow them to reopen their case after they have closed it in order to put the statement in evidence as a prosecution exhibit. Inevitably they will have to call the recording officer to give evidence as a witness for the prosecution.

With all due respect, I must disagree with my learned brother Mr. Justice Mahadev Shankar for the following reasons. Firstly, a trial-within-a-trial is a separate exercise entirely, divorced from the main trial; and its main purpose is just to determine the admissibility of the cautioned statement and is not concerned with the truth or untruth of the statement. Secondly, a witness's credibility or credit has to be assessed at the appropriate time, that is, at the end of the prosecution's or defence's case, as the case may be. No summary order impeaching the credit of a witness can be made. Abdoolcader FJ (as the then was) in *Datuk Mokhtar bin Hashim v. PP* said at pp. 276-277:

> When a witness's credit is sought to be impugned under the provisions of ss. 145 and 155(c) of the Evidence Act 1950 his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. No immediate order of a summary nature can or should be made as was done in this case and the right of cross-examination or re-examination according to the circumstances should not be denied as it may well be that on the exercise of such right his credit might be repaired, restored or re-established ...

To say therefore that cross-examination would have been a waste of time is not a proposition we can in any way consider acceptable or entertain. We are unable to say what cross-examination would have elicited and what different light it could or might have thrown on the situation, and in this connection consider as pertinent this passage from the judgment of Megarry J in *John v. Rees:*

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

Abdoolcader J (as he then was) took the correct approach in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors.* when he refused an application to make an immediate order impeaching the credit of a witness whose evidence contradicted his statement to the police but went on to consider his evidence as a whole at the close of the case for the prosecution and then discounted it as discredited and wholly disregarded it in the circumstances.

The Criminal Procedure Code does not mention impeachment of witnesses except in s. 113(1) Criminal Procedure Code which provides that where the accused tenders himself as a witness, any cautioned statement made by him may be used in cross-examination and for the purpose of impeaching his credit. And s. 37A(1) of the Dangerous Drugs Act 1952 is in *pari materia* to s. 113 Criminal Procedure Code. In this case here the 1st accused went to the witness-box and gave evidence on oath and therefore he was caught by s. 37A(1) of the Dangerous Drugs Act which *inter alia* states:

... and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

Cross-examination is the examination of a witness by the adverse party, that is, the party opposed to the one that calls him. What is the aim of cross-examination? Really there is one aim only. It is to assist in the administration of justice by revealing the truth to the Court. The function of cross-examination is to eliminate or reduce the danger that a false conclusion will be reached. Wigmore has declared that cross-examination is beyond doubt the greatest engine ever invented for the discovery of truth.

The powers of a cross-examiner generally are:

(1) to ask leading questions (s. 143 Evidence Act 1950);

(2) to impeach a witness for making a previous inconsistent statement

(s. 145 Evidence Act 1950);

(3) to test a witness's accuracy, veracity and credibility

(s. 146(a) Evidence Act 1950);

(4) to shake the credit of a witness by injuring his character

(s. 146(c) Evidence Act 1950).

Therefore if a witness is successfully impeached, the Judge may reject his evidence in its entirety; or after sieving the evidence, accept the part considered reliable. (See *Tua Kin Ling v. PP* [1970] 2 MLJ 61). But this must be done at the end of the case for the prosecution or defence, as the case may be.

Therefore in the interest of the general administration of justice and the need to ensure fairness and justice in Court which must be paramount, I am of the view that a cautioned statement of an accused person, provided that it is voluntary, not introduced during the prosecution stage, can be permitted to be used by the prosecution to impeach the credit of the accused person during the case for the defence because s. 145 and s. 155(c) are provided for by the Evidence Act 1950 and are still very much in force. I am fortified in my opinion I arrived at by the fact that Suffian LP sitting with Raja Azlan Shah CJ (as he then was) and *Lee Hun Hoe CJ* (*Borneo*) in *Husdi v. PP* [1980] 2 MLJ 80, FC at p. 81 said:

> Nevertheless in our view as ss. 145 and 155(c) of the Act have not been repealed, they must be given effect to, and cannot be treated as dead letters. Otherwise, Counsel who has a hunch that a defence witness has in his oral evidence departed from his *cautioned statement* may not be able to take advantage of the Evidence Act 1950 which allowed - and still allows - the prosecution to impeach his credit. Also, in the interest of justice the Court would want to know if a witness has departed significantly from his *cautioned statement.*
> (The italicised replaced words are mine).

I am fortified in the opinion I arrived at by s. 157 of the Evidence Act 1950 which states that:

> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Accordingly, I am of the view that before proof of the cautioned statement is undertaken the Judge should be shown the portion in the cautioned statement that are said to contradict the accused's evidence in Court for" ... as a first step it is essential that the Court should be given the discretion to determine a preliminary question whether the witness' former statement is inconsistent with his evidence, otherwise much time will be wasted if it found later that his former statement is not really irreconcilable with his evidence. We therefore think that it is a good procedure that a Judge should be shown the statement as a first step in the impeachment procedure". Per Salleh Abas FJ (as he then was) in *Krishnan & Anor. v. PP* [1981] 2 MLJ 121, FC at p. 124.

Sitting in the Federal Court with Lee Hun Hoe CJ (Borneo) and Abdul Hamid FJ (as he then was), Salleh Abas FJ (as he then was) said in the same case at p. 124:

> As regards the time when proof of a cautioned statement should be undertaken for the purpose of impeaching the credit of a witness, we are of the view that this could be given either before or after contradicting the witness. The only disadvantage is that if this proof is given after the witness has been contradicted there is always a possibility that the cautioned statement after an inquiry may not be held admissible. In that event all the previous efforts to impeach credit are lost and become a mere waste of time. It seems therefore preferable that in the case of impeaching the credit of a witness by the use of his cautioned statement, proof of the statement should be given before contradiction takes place.

And "The only way in which a previous statement of a witness can be used is by contradicting the witness by such writing and this can be only by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradiction. Those parts of the statement which are used for contradicting the witness must be proved and brought on the record." Per Sharma J in *Yusoff bin Sidin v. PP* [1971] 1 MLJ 203.

I have analysed with the utmost care the role of a cautioned statement of an accused person; if voluntary, it is admissible at his trial in evidence as contained in s. 37A of the Dangerous Drugs Act 1952. And I have also addressed myself to the fact that a trial-within-a-trial is not concerned with the truth or untruth of a cautioned statement and, accordingly, I am of the view that after those portions in the cautioned statement have been proved and brought on the record, they cannot be admissible as evidence of facts stated therein except for the sole purpose of contradicting the accused's evidence at the trial and no more. Otherwise, it would unwittingly form substantive evidence for the prosecution which would be most unfair to the accused as it would be tantamount to the prosecution re-opening their case. The cautioned statement if admissible and the portions in the cautioned statement once proved and brought on the record would be used for the limited purpose of contradiction. In other words, to test his credit and not as substantive evidence. "By analogy, I would refer to the Privy Council cases *Briji Bhushan Singh v. R. AIR* [1946] PC 38 and *Mamand v. Emperor AIR* [1946] PC 45, which are authorities for the proposition that a statement made under s. 164 of the Indian Criminal Code (equivalent to the old s. 113 of our Code) used for the purposes for impeaching the credit of a witness cannot be used as substantive evidence." Per Edgar Joseph Jr. J in *Pavone v. PP* [1986] 1 MLJ 72 at p. 74.

I am fortified in my opinion I arrived at by the fact that ... lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy. Per Salleh Abas FJ (as he then was) in *Krishnan & Anor. v. PP* [1981] 2 MLJ at p. 124.

I am also fortified in my opinion I arrived at by the fact that "These statements can only be used to impeach the credit of the witnesses. That is to say, when these statements have been proved, they do not become independent evidence of facts contained in them". Per Murray-Aynsley CJ in *Jones v. Rex* [1948] 14 MLJ 182.

And therefore the crucial point for the Court to decide at the outset is to determine whether the difference is so material or serious between his evidence in Court and his cautioned statement as to suggest the witness is unreliable, "the Court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement. If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the Court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubts as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue." Per Taylor J in *Muthusamy v. PP* [1948] 14 MLJ 57 at p. 59.

To do this, the cautioned statement must be proved to have been voluntarily made and therefore a *voire dire* hearing or as it commonly called a trial-within-a-trial must be held in order to determine the issue of admissibility.

I know a trial-within-a-trial is a separate trial; and after the inquiry, the cautioned statement may not be held admissible and consequently the trial-within-a-trial becomes a waste of time. As much as this procedure is cumbersome and slow, I agree with Lee Hun Hoe CJ (Borneo) who rightly has pointed out that "If this procedure is considered to be tedious, inconvenient and time-consuming, the proper remedy would be for the legislature to amend the law". See *Muluk b. Ahmad & Anor. v. PP* [1989] 1 CLJ (Rep) 113

I therefore ruled that:

(1) the cautioned statement of the accused person be shown to the Judge in order for him to determine the said contradictory portion in the accused's cautioned statement;

(2) if the Judge finds material contradiction in the cautioned statement, a trial-within-a-trial be held to determine the cautioned statement's admissibility;

(3) the said contradictory portion must be proved and brought to record:

(4) the said contradictory portion cannot be admissible as evidence of fact stated therein except for the sole purpose of impeaching the accused's credit.

Also found at [1990] 1 CLJ 325